

**Professional Air Traffic Controllers Organization
and Patco Employees Union. Cases 5-CA-
12341 and 5-CA-12506**

May 14, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS JENKINS AND HUNTER

On December 29, 1981, Administrative Law Judge Bruce C. Nasdor issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge, but not to adopt his recommended Order.³

¹ Respondent has implicitly excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In the subsection of his Decision entitled "The Discharges," paragraphs 20 and 22, respectively, the Administrative Law Judge stated that there was "not a scintilla of evidence of union animus" on the part of the employer in *Rio-Del Tool Mfg. Co., Inc.*, 199 NLRB 969 (1972), and that the employer in *Midland Container Corp.*, 190 NLRB 328 (1971), had "no knowledge" of union activity. In both instances, the correct reference is to the absence of any "direct" evidence of union animus by the employers.

² We agree with the Administrative Law Judge that Respondent's "no-distribution" rule violated Sec. 8(a)(1) of the Act because it was overly broad and was discriminatorily enforced. Chairman Van de Water and Member Hunter find that the rule, which Respondent applied to the distribution of union literature during "working hours," would be "invalid under *Essex International, Inc.*, 211 NLRB 749 (1974), as well as under the broader restrictions set forth in *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1981)."

In adopting the Administrative Law Judge's conclusion that Respondent discriminatorily discharged employee James Lyons, we do not rely on the negative inference he drew from Respondent's failure to produce certain subpoenaed documents. Inasmuch as the record reflects a substantial degree of confusion concerning the nature, and indeed the very existence, of the documents in question, we cannot, under the circumstances, conclude that such an inference is warranted.

Conclusions of Law 7 and 8 are redundant. Therefore, we will amend the Administrative Law Judge's Conclusions of Law by deleting Conclusion of Law 7 and renumbering Conclusion of Law 8 as Conclusion of Law 7.

³ We will issue an order in lieu of that recommended by the Administrative Law Judge so as to correct minor inadvertent errors.

Member Jenkins would provide interest on the backpay required herein in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 7 and renumber Conclusion of Law 8 as Conclusion of Law 7.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Professional Air Traffic Controllers Organization, Washington, D.C., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with respect to wages, hours, and other terms and conditions of employment with the PATCO Employees Union as the exclusive bargaining representative of its employees in the following appropriate unit:

All staff employees employed by the Employer at its national headquarters in Washington, D.C., but excluding all confidential employees, guards and supervisors, as defined in the Act.

(b) Discharging, or otherwise discriminating against, employees because of their activities on behalf of PATCO Employees Union, or any other labor organization.

(c) Promulgating, maintaining, and discriminatorily enforcing a rule prohibiting distribution of union literature during "working hours."

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the PATCO Employees Union, as the exclusive representative of all employees in the appropriate unit described above, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Offer James Lyons, James Miller, Fran Feldman, and Steven Hubscher immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make James Lyons, James Miller, Fran Feldman, and Steven Hubscher whole for any loss of earnings and other benefits they may have suffered due to the discrimination practiced against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Rescind its rule prohibiting distribution of union literature during "working hours."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its premises in Washington, D.C., copies of the attached notice marked "Appendix."⁴ Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Respondent shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

⁴ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with PATCO Employees Union as the exclusive bargaining representative of our employees in the appropriate unit:

All staff employees employed by the Employer at its national headquarters in Washington, D.C., but excluding all confidential employees, guards and supervisors, as defined in the Act.

WE WILL NOT discharge, or otherwise discriminate against, employees because of their activities on behalf of PATCO Employees Union, or any other labor organization.

WE WILL NOT establish, maintain, or discriminatorily enforce a rule prohibiting distribution of union literature during working hours.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL, upon request, bargain collectively with the PATCO Employees Union as the exclusive representative of all employees in the unit described above, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL offer to James Lyons, James Miller, Fran Feldman, and Steven Hubscher immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole James Lyons, James Miller, Fran Feldman, and Steven Hubscher for any loss of pay and other benefits they may have suffered due to our discrimination against them, together with interest.

WE WILL rescind our rule prohibiting distribution of union literature during working hours.

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION

DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge: This case was heard in Washington, D.C., on September 2, 3, and 4, 1981.

The charges in this proceeding were filed by PATCO Employees Union (hereinafter referred to as the Union or PEU) on June 23 and August 6, 1980.¹ The substantive issues to be resolved are whether Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (hereinafter referred to as the Act), by discharging James Lyons, James Miller, Fran Feldman, and Steven Hubscher. Also at issue is whether Respondent unlawfully promulgated an overly broad no-distribution rule. The complaint alleges that the Union has been designated by a majority of Respondent's employees in an appropriate unit at all times material herein, as their collective-bargaining representative for the purpose of collective bargaining with Respondent. Moreover the complaint alleges as an issue to be resolved that Respondent failed and refused to recognize and bargain in good faith with the Union and has engaged in a course of conduct designed to undermine the Union's status as the collective-bargaining representative. The complaint was amended at the hearing to reflect that counsel for the General Counsel was requesting a *Gissel*² bargaining order as an appropriate remedy for the alleged illegal conduct of Respondent. This is the final issue to be resolved.

¹ All dates are in 1980, unless otherwise specified.

² *N.L.R.B. v. Gissel Packing Co., Inc., et al.*, 395 U.S. 575 (1969).

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a labor organization with its national headquarters located in Washington, D.C. It annually receives dues in excess of \$50,000 from outside the District of Columbia. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

Record testimony reflects that Respondent's employees decided to form a union to improve their wages, hours, and working conditions, by collective bargaining with Respondent. PATCO Employees Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE APPROPRIATE UNIT

The parties stipulated that all staff employees employed by the Employer at its national headquarters in Washington, D.C., but excluding all confidential employees, guards and supervisors, as defined in the Act, is appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent, a labor organization with national headquarters located in Washington, D.C., represented most of the air traffic controllers employed by the Federal Aviation Administration (FAA) throughout the country. In February, Respondent's executive board appointee Robert Poli and Robert Meyer to serve as interim president and vice president, respectively, until the election which was scheduled for April 1980. On January 31, Respondent's general counsel for approximately 10 years resigned. For the next 3 months, until the election in April, Poli and Meyer spent little time in the office because they were campaigning, visiting Respondent's locals, and attending seminars. During this period, Dennis Reardon, director of operations, was the sole person in the national office responsible for coordinating and making decisions for the operation of the national office.

In February, James Lyons, an alleged discriminatee, was hired as Respondent's director of research. In its campaign literature, Poli and Meyer set forth that they would implement programs to enhance certain areas including effective use of our new research department to enable PATCO to have up-to-the-minute knowledge of developments affecting our jobs in the aviation industry; communications with Congress and public will be supported by careful analysis and documentation.

In April, Respondent's membership at a convention in Las Vegas elected Poli and Meyer as president and vice president, respectively.

In February two of Respondent's employees, Steven Hubscher and James Miller, began discussing the feasibility

of seeking union representation for Respondent's employees. Thereafter they discussed the idea with other of Respondent's employees but principally with Lyons, who is an attorney.

On May 21, an employee meeting was held at a restaurant. All of the individuals who worked at Respondent's office in Washington, D.C., were present with the exception of Poli, Meyer, Reardon, Michael Rock, John Lapine, Kathy Tinkey, John Seddon, and Robert Collins. According to the testimony of Lyons, he did not consider Seddon or Collins to be employees of Respondent. Rather, they would work on particular projects from time to time. Rock and Lapine, although paid out of the national office, normally worked in New York. At the meeting, discussion revolved around the need for a union to represent the employees for purposes of collective bargaining with Respondent over their wages, hours, and working conditions. The employees expressed an intent to be represented because there were no written or articulated personnel policies or practices. Therefore the employees felt in the dark and insecure. Moreover, according to the testimony of Lyons, no one had job descriptions. During the campaign for national president, Poli's opposition, who was then regional vice president in New York, had commenced to launch attacks upon the competency and the resources existing at the national headquarters in Washington, D.C. This added to the employees' insecurity, in that they became privy to memorandums and campaign literature setting forth that the individuals at the national headquarters were incompetent. If Poli's opposition was elected, he would "come down there and clean house." At the meeting, Respondent's employees decided that the unit should be combined with both professional and nonprofessional employees. A committee then was formed to consider the possibility of affiliating with another labor organization. Union authorization cards were then distributed by Miller to all of the 18 employees in attendance. It was explained that the cards authorized the PATCO Employees Union (hereinafter referred to as PEU) to represent the employees, without the necessity of an election in the event that Respondent recognized the Union. Miller then collected all of the union authorization cards which were then examined by Lyons, who determined that each card had been signed and dated by all of the 18 individuals who were present at the meeting. Miller and Fran Feldman, the dues rebate clerk, volunteered to present the cards to Poli.

On the afternoon of May 23, Miller and Feldman presented the cards to Poli and told him that the employees had met and decided to form a union. Poli looked through the cards and objected to the inclusion in the unit of James Scott, Respondent's comptroller, because Poli considered him to be a supervisor. Poli stated that he felt that the formation of a union was "great" and would make his job "a whole lot easier." Miller told Poli he was proud of the way that he, Poli, had accepted this. Following this meeting Poli walked through the office and shook hands with the employees. He also told Lyons that he, Poli, would be a poor union president if he did

not recognize the right of his own employees to organize.

Miller testified that, after his meeting on May 23 with Poli, his communication with management ceased, because no one talked to him thereafter.

On May 29, a meeting was held, where Feldman and Miller apprised those in attendance of what had happened when they presented the cards to Poli. There were approximately 14 employees in attendance at this meeting, and they discussed the selection of PEU officers. It was decided to hold a secret-ballot election either on June 9 or 10, and they talked about possible candidates. Discussion also ensued regarding the formation of committees to check into possible affiliation by PEU with a national union and the adoption of bylaws. Two more meetings were held on June 9 or 10, and the same topics were under discussion. The Employees decided to assess an initiation fee and monthly dues. They also decided to have five officers, and nominations were then made. The election on June 10 resulted in the selection of Lyons as president; Hubscher, vice president of operations; Feldman, vice president of finance; Jack Maher, vice president of grievances; and Scott, secretary-treasurer.

The next day, on June 11, Lyons met with Poli and presented him with a letter which set forth the fact that the PEU had elected officers the day before. The names of the officers who are referred to above were set forth. The document also contained the names of the employees in the bargaining unit. Lyons thanked Poli for acknowledging and recognizing the Union. He also expressed his desire to have a fruitful collective-bargaining relationship with him. Poli congratulated Lyons on being elected president of the Union, and said he thought that the employees had chosen a capable person, and that he and Lyons would get along fine. Poli brought up the issue of Scott's eligibility in the bargaining unit and Lyons indicated that there might be some way to work around that issue. This question was left open for further discussion.

At approximately 4 p.m., on June 11, the employees assembled and were introduced by Poli to an individual named Manheim Shapiro. Poli stated that Shapiro was there to do a study of the office, and that he had expert credentials. The testimony reflects that Shapiro talked about his credentials, including a PHD in social psychology and his membership in several professional organizations. He explained that he was there to conduct a study of how work got done in the office, how people worked with one another, how they communicated with one another, and what the product of that communication was. Lyons asked whether any guarantees could be given that jobs would not be abolished or downgraded as a result of the study. Shapiro responded that he could not give such guarantees. When the meeting ended, Lyons addressed Poli stating to him that the employees were upset about the study, and that PEU needed to have some role in the matter. Poli agreed to meet with Lyons. In October 1979, there had been a management study which came to be known as the "Kilgallon report."

After the meeting in the conference room with Shapiro, Lyons talked with Maher, Lapine, Miller, and some

other people. He then went back to his office, and some time after 5 p.m. Poli entered. Poli commenced discussing the composition of the bargaining unit. Poli wanted to exclude Rock, Long, Maher, Lyons, Scott, Donna Fick, Jan Finklea, and the individual who was to become Meyer's secretary.³ Lyons responded that these people were properly within the unit, and the matter was left unresolved. Lyons requested that PEU have some input in the Shapiro study and on the background of Shapiro. Lyons further delineated, why in his opinion the individuals Poli had referred to should be in the bargaining unit, as they were not confidential employees or supervisors. Poli insisted that the study did not involve PEU in any way, and they had no right to have anything to do with it, or have any input whatsoever, and management would conduct the study. Poli agreed to meet with Lyons the next morning.

Poli did not meet with Lyons the next day, June 12, and, as a result, Lyons drafted a letter which he presented to Poli's secretary, and which was also posted on the bulletin board. The letter requested that implementation of the management survey be delayed until the Union had an opportunity to respond with bargaining proposals concerning the procedures, purposes, and impact of the study. The letter also stated that PEU would view proceeding with the study without meeting its legal obligations to be an unfair labor practice by management.

That evening the Union held a membership meeting in the library of the Marine Engineers Beneficial Association, rather than in Respondent's library, where meetings were normally held, because, according to the testimony of Lyons, the atmosphere in Respondent's office had gotten very tense. Some of the people at the meeting took the position that they would flatly refuse to cooperate with the study, while other people were frightened and intimidated. After discussing alternatives with Lyons, the membership determined that they would cooperate with the study although they would demand that a PEU representative be present. A card was drafted for each individual to present to Shapiro or any other interviewer.⁴ The card stated:

I consider you an agent of management.

My Union has requested that management meet with it and consider proposals and requests for information with respect to the procedures, purposes and impact of this study.

This request has not been complied with.

Therefore, while I have no information to volunteer, against my will I will answer direct questions posed by you.

I also consider that I am entitled to have a union representative present at this meeting if I so desired. [sic.]

Finally, this interview is being conducted under conditions which may lead to the filing of unfair labor practice charges against management.

³ At that time the individual had yet to be hired.

⁴ This was received into evidence as G.C. Exh. 7.

Poli agreed that the individuals who participated in the "Shapiro interviews" could have a PEU representative present.

On June 16, Lyons met with Poli in Poli's office. They again commenced to discuss Poli's position with respect to the bargaining unit. They talked principally about Scott, Long, and Maher. It was Poli's position that they should not be included in the bargaining unit. Lyons had previously talked to Scott and advised him that he thought that Scott indeed should not be included in the unit. Accordingly, Lyons agreed with Poli that Scott should be excluded, but he disagreed with Poli as to Long and Maher. Furthermore at this meeting, Lyons specifically remembered in his testimony that Poli told him they had big plans for him. Lyons testified that Poli stated management was going to have him reporting directly to Robert Meyer, and he would have his own department with three or four people working for him. Poli's testimony specifically refuted the testimony of Lyons in this regard. It is noted, however, that the testimony of Reardon reflects management's intent to expand the research department and to increase the staffing of same to aid Lyons in his mission. At the meeting between Poli and Lyons, Lyons reiterated the Union's position that it should have input in the management study, and Poli continued to deny the Union's right to this input. The meeting concluded with Lyons stating that unfair labor practice charges might be filed if things did not improve, and he requested another meeting so that Maher, Hubscher, Miller, and Feldman could attend.

During this period of time Lyons had heard comments that Poli was making inaccurate references to their conversations. Therefore, Lyons testified that he no longer trusted Poli, and he wanted witnesses at future meetings. On June 17, a meeting ensued among Lyons, Feldman, Hubscher, Meyer, and Poli. At this point, the status of Scott had been resolved. He was to be excluded from the unit. Poli took the position that Lyons, Ficik, and Finklea should be excluded from the unit. After some discussion, Lyons again brought up the management study. At one point in the meeting, Meyer (Respondent's vice president) asked a question and Lyons began to respond. He was interrupted by Meyer who stated that as far as he, Meyer, was concerned Lyons did not exist, and he was addressing himself only to Feldman and Hubscher. Later during this meeting, Lyons stated that employees were concerned about the study because of past events and the atmosphere in the office. Poli responded that no one would be hurt by the study, rather it was going to help everybody. Lyons commented that if management wanted to fire someone for being disloyal, incompetent, or whatever reason, all that had to be done was to use that reason, and one did not need a study for this purpose. Lyons asked Poli whether he would reduce to writing that as a result of a study no jobs would be eliminated or downgraded. Poli told Lyons to draft an agreement. Lyons wrote a statement that PEU agreed to cooperate fully with the study, and that Respondent agreed that the study would not be used to demote or discharge employees. Poli and Meyer left the office to caucus, and, when they returned, announced that they could not sign the agreement, and that there was nothing further to dis-

cuss about this study. On June 18 or 19, it was announced that there would be no further interviews, and the study was aborted. Respondent posits by way of colloquy that Lyons prevented the study from taking place, "it was cancelled in mid-stream." On June 18, Shapiro came to Respondent's office to interview employees. There were approximately four interviews, and each of the four employees presented Shapiro with a card containing the language I have referred to earlier. They would not answer the questions posed by Shapiro.

On June 19, Poli sent a letter to all of the employees stating that it was perfectly acceptable to him, that the employees desired union representation for purposes of collective bargaining, but that he felt that he was legally required to exclude seven employees from the unit. He named four individuals he felt were supervisors: Scott, the comptroller; Finklea; Reardon; and Lyons. He also named three individuals he felt were confidential employees: Seigel, Poli's secretary; Sherril Luff, Meyer's secretary; and Ficik, Reardon's secretary. Of these seven named individuals, the Union had already agreed that Scott should be excluded and there was never any question that Director of Operations Reardon should not be included in the unit. It was stipulated by the parties at the hearing that he was a supervisor within the meaning of Section 2(11) of the Act. Seigel had previously advised Lyons that she did not want to be included in the unit. The parties stipulated that she was a confidential employee, and, as such, should be excluded from the unit. Accordingly, of the employees that the Union claimed to be unit employees, Respondent would exclude 4 or 20 percent of the unit.⁵

The employees were required to affix their initials to Poli's letter, so as to reflect that they had received copies of the document. Lyons felt he was being undercut as president of PEU. He therefore began to prepare a letter which he intended to post on the bulletin board and distribute to the employees. Prior to doing this he approached Poli and asked him if Poli's letter meant that he no longer recognized him as president of the Union. Poli responded that he did not recognize Lyons as president of PEU. Lyons then posted the letter on the bulletin board and distributed it to the employees who were in the office. The letter reflects, *inter alia*, what had occurred at the June 17 meeting. It also sets forth that Poli refused to recognize Lyons as president of the Union, because Poli considered him to be a supervisor within the meaning of the Act and that Lyons would take appropriate action. Moreover, according to Lyons' distribution, he states that stories were circulating that he made statements to Poli, which would reflect on his, Lyons', character.

On June 20, Lyons executed an unfair labor practice charge, alleging that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act.

Lyons was in Oklahoma City from June 22 to 25, working on a case he had been assigned by Reardon. When he returned he was informed that Respondent had

⁵ G.C. Exh. 5 lists 20 employees. Scott should be excluded. Luff (Roach), who was not in Respondent's employ on June 10, the date the document was prepared, should be included in the unit.

reduced the duties of Lapine, had cut back the labor study school for 4 weeks affecting the jobs of Long and Miller, and had changed the locks on the doors, thereby eliminating free access to the office which, according to Lyons, the employees had historically enjoyed. Thereafter, on July 1, Lyons transmitted a letter to Poli protesting these things which Lyons viewed as retaliation for union activities. Lyons protested these actions and demanded that Poli meet with the Union and the employees affected to "negotiate and/or discuss the same."

Meyer, Respondent's executive vice president, testified that on July 2 Respondent's executive board met at the Hyatt Regency hotel in Rosemont, Illinois, to discuss the financial problems facing Respondent, particularly the increase in monthly expenses caused in part by escalating legal fees. The board, according to Meyer, unanimously agreed to take certain action to cut back on expenses. Meyer testified that the board did not discuss the Union.

The executive board proposed suspending classes at the facility representative school for labor studies and the termination of Miller. It proposed further terminating Feldman, and closing the research department which eliminates Lyons. Hubscher was also to be fired. On his testimony, Poli referred to Miller as the junior instructor at the school, because he had less seniority than the other instructor.

On July 8, Poli placed a conference call to seven members of the executive board. Meyer also participated in this call and made minutes of same which were received into evidence. Poli stated that the purpose of the call was to discuss Respondent's financial picture. He turned the meeting over to Meyer who testified that he recommended closing the facility representative school from August until the end of the year and eliminating unnecessary positions. Meyer's testimony and the documentary evidence reflect that he expressed his concern about rising legal fees and increased expenses of Respondent's negotiating team due to inflation, plus the fact that the April convention went over the \$50,000 budget. John Paolino, vice president of Respondent's Great Lakes region, introduced the following motion: "In order to maintain fiscal responsibilities and reduce operating costs at the National Office, the Executive Board of the Professional Air Traffic Controllers Organization directs its president, Robert E. Poli, to eliminate unnecessary positions and programs as necessary." During the conference call, according to Meyer's testimony, he explained the closing of the school and the elimination of certain positions which saved approximately \$135,000. The Board unanimously passed Paolino's motion. After this conference call, Poli and Meyer discussed how to make staff cuts, and it was determined that Feldman be terminated, because in their opinion her work could be absorbed by two other people in her department. Meyer testified additionally that he recommended Lyons and Hubscher be terminated, and their duties absorbed by Reardon and himself. The final recommendation which Poli acted on was that Miller be terminated because the school was going to be closed. Respondent's witnesses testified that Poli made the final decision as to which of the employees were to be terminated.

Sometime during the third week in July, the PEU members decided to engage in informational picketing. It was explained to them that this was not a strike, rather it was a method of informing the public that they were having difficulties engaging in negotiations with Respondent. Lyons was to draft the language for the placards. The placards bore the following legends: "PATCO thinks union good for air traffic controllers, but not for its own employees. PATCO calls employees' controllers, but not for its own employees. PATCO calls employees' union president a supervisor, tries to undermine unions. PATCO unfair to employees." Picketing lasted for approximately 4 days and occurred on the sidewalk in front of the Respondent's office before and after working hours and during the lunch break.

On or about July 18, Poli ordered Hubscher not to circulate union material during working hours. Hubscher testified that, prior to that time, he knew of no policy or rule maintained by Respondent with respect to the distribution of personal literature. Hubscher testified without contradiction that on several occasions employees had sold raffle tickets, tupperware, and football pools.

On July 23, Lyons learned that the National Labor Relations Board was going to dismiss his charges which alleged, *inter alia*, that Respondent was attempting to undermine the Union by characterizing him as a supervisor. As a result of this and Poli's refusal to recognize him as union president, Lyons held a meeting in the MEBA library that evening and informed the employees that he could no longer serve any useful purpose as president. He appointed Feldman to act as president, and stated his intent to remain active in PEU. He advised the 13 to 14 people who were in attendance at the meeting to file a petition for an election with the National Labor Relations Board. The membership agreed to conduct an election for new officers on July 29. Lyons drafted a letter which set forth what occurred at this meeting, including the fact that there would be an election for new PEU officers on July 29. This letter was posted on the bulletin board on July 24.

On the afternoon of July 28, Poli called Miller into his office and informed him that due to financial reasons the facility representative school was being closed, and Miller was being terminated with severance pay. Miller filed for unemployment compensation and gave as the reason he was no longer in Respondent's employ, that his position was abolished.

That same afternoon Poli informed Lyons that the executive board had decided to eliminate the research department to help cut the budget, and Lyons' position was eliminated. Meyer offered to write a letter of recommendation for Lyons who declined this offer.

The same afternoon Poli informed Hubscher that his job had been eliminated for financial reasons. Hubscher requested a letter of recommendation and Poli agreed that he would give him one which Hubscher himself could draft. Lyons wrote a favorable letter of recommendation for Hubscher, which Poli signed. Poli also entered into a written agreement with Hubscher to respond favorably to any inquiries which he may have received from perspective employers.

Also, that afternoon Poli and Meyer informed Feldman that Respondent was having budgetary problems and that Respondent would have to let her go.

All four of the alleged discriminatees were told that they were to be out of the office by 5 p.m. that day July 28. None of them had been given any prior warning that they might be terminated, and none of them were offered an opportunity to remain in lesser positions or at reduced salaries.

Poli testified that the final decision to terminate Feldman, Lyons, and Hubscher was made on July 28, and the decision to terminate Miller was made in June although he had discussed it with Meyer sometime in May. Meyer's memo which was received into evidence as Respondent's Exhibit 17, and is dated July 3, reflects that Respondent's national executive board met on July 1 and 2 at the O'Hare Regency Hotel in Rosemont, Illinois. The memorandum further reflects that the board agreed on July 2 to discharge all four alleged discriminatees. Poli testified, contrary to Meyer's memo, that there were no recommendations as to which specific individuals would be "cut or laid off."

Lyons, whose title was director of research, was the in-house Federal employee labor relations expert in matters of collective bargaining, unfair labor practices, and arbitration. Among his other duties, he helped the locals with unfair labor practice cases and arbitrations, and provided interpretations to both the locals and the national office, on a variety of Federal laws and regulations. He also helped prepare congressional testimony. Respondent witnesses testified that, after July 28, Lyons' duties were performed by the director of operations and regional staff personnel. His other duties, according to the testimony, were discontinued. Between July 28, and December, the legislative testimony was prepared by Poli, Reardon, and Simons.

Feldman was the dues rebate clerk, and, according to her testimony, she was the only employee in the dues rebate department. She was in charge of rebating dues to the approximately 400 and some odd locals of Respondent. She had other duties, including the responsibility for correspondence and telephone calls and special assignments which she received from Scott. At one time she edited a story for the 1980 convention book.

Feldman began in Respondent's employ on July 1, and received a \$2,000 raise some time in early July. In December she began using a computer to replace her adding machine. She testified that otherwise her duties were performed manually. At the time Feldman was terminated, Respondent was preparing to consolidate the locals' bank accounts from 400 some odd locals to either 7 accounts, 1 for each of Respondent's regions, or to 1 account as the bank had advised. According to the testimony, this would have increased Feldman's work, because after the consolidation, she would have been responsible for reconciliation of the accounts and for breaking down the master account into some 400-odd separate accounts so that each local would know how much money it had in the account. At that time the bank was responsible for reconciling the accounts. The purpose of this consolidation was so that Respondent could earn interest on a local union's money in the bank ac-

counts which totaled approximately \$200,000. Scott, Respondent's comptroller, testified that it was initially projected that Respondent would earn approximately \$30,000 annually, but that prior to consolidation it was earning no interest whatsoever on the 400 and some odd accounts. The projections were that this project would be completed by November. Respondent at the time of the hearing had still not completed this project.

Hubscher was titled a research assistant, and, as such, he worked on a facility representative manual, a grievance computerization program, and matters dealing with labor relations research. He was also Respondent's representative to the AFL-CIO public employee department. Prior to May, Hubscher had been Reardon's assistant. From February 1980 to June or July, he began performing a number of duties as an aide to Lyons. Miller, whose job title was educational coordinator, was an instructor at the labor study school, located at the George Meany Institute in Silver Springs, Maryland. Long was a coinstructor with Miller. Miller also worked on the 1981 strike. The students at the school were air traffic controllers, who were taught labor history, labor law, arbitration, grievance handling, and successful strike tactics. Miller testified that, when he was hired initially, he was told by Reardon that Respondent had big plans for the school, including putting it on the road. Miller testified further that he had had discussions with Poli, Meyer, Long, and Maher regarding the purchase of a building to house the school, rather than continuing the outlay of money to the institute for rental. Respondent was renting the facilities at the George Meany institute. Although when Miller was hired in January, he was told by Reardon that his salary would be reviewed in 1 year, he received a \$2,000 raise in May.

Paul Hadley commenced working for Respondent as a summer intern on June 9. Respondent has not employed a summer intern since the beginning of 1978. Hadley testified that his salary was \$250 a week and that Respondent also paid for his apartment which cost in excess of \$400 per month. During the first 4 days of Hadley's employment, Respondent paid for his stay at the Hyatt Regency Hotel in Washington, D.C., at a cost of \$75 per night. Hadley had a bachelor's degree in English and a master's degree in systems management, and at that time had completed 1 year of law school. In the middle or third week of July, he had a conversation with Reardon wherein Reardon asked him if he would consider working full time for Respondent in lieu of returning to law school. Hadley responded that he did not want to leave law school.

Additional Evidence Relating to Respondent's Economic Defense

For the 6-month period ending June 30, 1979, Respondent spent \$254,159 on salaries for the national staff. For the 6-month period ending June 30, 1980, Respondent spent \$388,116 on the same item. For the 6-month period ending December 31, 1980, salaries amounted to \$372,706.

As of June 30, 1979, Respondent's net worth was \$450,995. As of June 30, 1980, its net worth was

\$189,957. By December 31, 1980, its net worth was the deficit figure of \$139,111.

According to Respondent's accountant, the significant cause of the decrease in net worth was Respondent's legal expenses, which totaled \$605,996 for 1980, of which \$457,875 were incurred in the last 6 months of that year.

On July 28, the day of the discharges, an employee, David Trick, commenced to work for Respondent at a salary of \$41,500 per annum.

In October, Poli received a raise of over \$5,000, Meyer received a raise of over \$4,000, Rock received a raise of \$4,000, Maher a \$4,000 raise, Long received a raise of \$4,000, Trick⁶ received a raise of over \$3,500, Lapine received a raise of \$4,000, and (Luff) Reoch received a raise of \$1,500. In July, Lundy received a raise of \$2,000 and 2 months later, in September, he received another raise of \$4,000. In September Klove received a raise of \$1,500, and Boyer received a raise of \$1,000. Within 3 months of the discharges, Respondent granted raises amounting to \$38,500.

Reoch was hired approximately June 16 and Wilson began working for Respondent on June 2. Reoch's position, secretary to Meyer, had been vacant since November 1979.

Respondent spent \$12,736 more on travel, meals, and lodging for the last 6 months of 1980 than for the same period in 1979. Testimony by Meyer reflected that Respondent in the past, and during the present, has paid to house people at the Hyatt Regency at approximately \$70 per night for extended periods⁷ of time, and will continue to do so in the future. Meals are also paid for.

The amount expended for national salaries for the 6-month period ending June 30, 1980; \$388,116; includes an impressive amount of severance pay. Leydon, Poli's predecessor, received approximately \$50,000. Ferri received over \$13,000 in severance pay.

Therefore the \$388,006 figure is reduced by approximately \$63,000 amounting to \$325,116, or an increase for the last 6 months over the first 6 months, of almost \$50,000.

Documentary evidence reveals that in 1979, Respondent spent \$106,519 in "litigation costs—Judgment." The figure for 1980 was \$75,000 or \$31,519 less.

Respondent witnesses testified that it faced the potential liability of a \$5.5 million lawsuit. A judgment in that action of \$850,000 was rendered approximately 1 year after the terminations. As of the time of this litigation it was under appeal, so nothing has been paid.

Conclusions and Analysis

In my judgment the evidence amply demonstrates that, on May 21, the Union had been designated as the collective-bargaining representative for the unit employees, by 19 of said employees, a clear cut majority. Siegel, a confidential employee,⁸ Poli, Meyer, and Reardon should be

excluded from the unit. Although the status of Scott was not litigated at the hearing, the evidence discloses that Lyons ultimately agreed with Poli that Scott should be excluded from the unit because of his supervisory status.

Record evidence clearly demonstrates that Lyons was not a supervisor within the meaning of the Act. He worked directly under Reardon and essentially was a one-man research department. He neither assigned nor reviewed work. He was not given any authority to hire or fire employees. Reardon's statement during the course of his examination, wherein he responded affirmatively that he told Lyons he could hire people, is completely contrived in my opinion. Reardon and Lyons were allegedly discussing the status of Hubscher. For approximately 4 months, Hubscher, on a few occasions aided Lyons in his duties. Reardon testified that he told Lyons if he were not satisfied with Hubscher's work, or found him inadequate, he, Lyons could arrange through Reardon to interview another individual as a replacement for Hubscher. Lyons may have, on one occasion, been asked to evaluate a coworker (Hubscher). This hardly qualifies him as a supervisor. I consider that Respondent acted in bad faith by maintaining otherwise.

There is no question in my mind as to the validity of the cards. I consider them valid in view of the fact that the evidence discloses the employees were told that the cards would be used by the Union to seek recognition from Respondent as the exclusive collective-bargaining representative of the employees. Hubscher's unrefuted testimony is that Laine signed and dated his card in his presence. Accordingly his card is valid although he did not testify at the hearing. I find Tinkey's card to be valid. She testified that Hubscher told her the purpose of the card was to seek recognition from Respondent. That she failed to fill in the name of the labor organization resulted from the fact that the name of the labor organization had not yet been determined. It is clear that Tinkey's intent was to designate this Union as her collective-bargaining representative.

The No-Distribution Rule

In my view, Respondent's no-distribution rule violates Section 8(a)(1) of the Act for two reasons. First the rule as stated was overly broad. The evidence discloses that Respondent did not have any policy with respect to distribution of anything, including literature. Moreover, employees sold raffle tickets, football pools, and Tupperware, with Respondent's countenance. *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1969). Secondly, the rule violates Section 8(a)(1) of the Act because it was promulgated during the time that the Union was organizing the employees in an effort to gain recognition. Therefore, I agree with counsel for the General Counsel that, even if the rule were "lawful on its face," it would independently violate Section 8(a)(1) of the Act. In *Montgomery Ward & Co., Incorporated*, 227 NLRB 1170 (1977), the Administrative Law Judge stated with Board approval that "this leads me to conclude that the promulgation of the rule herein in this manner was intended to interfere with the employees' rights of self-organization rather than to maintain production and discipline." I

⁶ He received this raise after working for Respondent approximately 3 months.

⁷ For example, Reardon was unable to sell his house, so Respondent provided his quarters and paid for his meals.

⁸ She was excluded by stipulation.

conclude that the rule herein was promulgated as a direct response to the employees' union activities. See also *Pedro's Inc., d/b/a Pedro's Restaurant*, 246 NLRB 567 (1979).

The Discharges

The comment by the court in *N.L.R.B. v. Hotel Conquistador, Inc., d/b/a Hotel Tropicana*, 398 F.2d 430, 435 (9th Cir. 1966), rings true in the instant case. "Determining the actual motive behind the dismissal of an employee is of course often an extremely difficult task, dependent principally upon circumstantial evidence and informed estimates concerning the springs of human conduct."

This case is most extraordinary and a typical of cases coming before the National Labor Relations Board. The parties are articulate, convincing, well educated, informed, and sophisticated in the field of labor law. This serves to make ferreting out the truth even more difficult.

Respondent had knowledge that Lyons, Feldman, Miller and Hubscher were the most active union adherents, this is clear. The undisputed testimony is that these four individuals were called into Poli's office on July 28, a Monday, and summarily discharged the day before the new election of union officers.⁹ Furthermore, the terminations occurred a matter of days after the picketing, and immediately after the Union and Respondent were informed that the National Labor Relations Board was going to dismiss Lyons' charges. It is equally undisputed that these employees were given no advance warning, were told to be out of the building by 5 o'clock, yet they were offered severance pay. Moreover, none of these employees were given an opportunity to work for Respondent at a reduced salary. I agree with counsel for the General Counsel that summarily terminating employees is normally done so that they will not arouse other employees. It is highly suspicious here that they were given severance pay, yet Respondent did not desire any additional productivity as a *quid pro quo*.

The terminations of these individuals was so sudden and abrupt, that it left no time for a transitional period in Respondent's operation. Respondent was in the process of consolidating the bank accounts of its locals from 450 to 7. Feldman, a dues rebate clerk and the only individual in that position, would have had to have reconciled these 7 accounts and maintained records which would reflect the amount of each account belonging to each of the 450 locals. Therefore her duties should have increased substantially. As counsel for the General Counsel points out, this project which was scheduled for completion in November was contemplated to earn Respondent \$25,000 to \$30,000 annually, more than double Feldman's annual salary. Yet in the face of her increased duties which would have increased Respondent's income, Feldman was fired. As of the time of the hearing the consolidation of these accounts had not yet been completed. No changes were recommended with respect to Feldman's duties or position in the management study, known as

⁹ A letter had been placed on the bulletin board on July 24, setting forth, *inter alia*, that a new election was to be conducted on July 29.

the Kilgallon report, which was published in the fall of 1979. Moreover, a few weeks prior to her discharge, Feldman received a raise.

Reardon testified that economic reasons was only one factor in his decision to close the facility representatives school. He never did testify as to what other factors were involved in his final decision to recommend to Meyer that the school should be closed. Respondent asserts as its basis for the discharge of Miller the closing of the school. Long, it is true, was the more senior instructor. There is no evidence that he was an active union proponent, although he did sign a card. What was never explained by Respondent is the fact that Long was given additional duties while Miller was terminated. Furthermore, Miller was involved in preparation for the possible strike, which did ensue, in 1981. He had also received a \$2,000-per-annum raise in May, which he was not due to get until January 1981. Meyer testified that the school cost Respondent \$250,000 to \$300,000 annually. Respondent's records reflects it was \$200,000 to \$220,000, and the result of closing the school was that Respondent was forced to pay over \$42,000 for what appears to be a penalty for cancellation without sufficient notice. It is also noted that one of Poli's campaign promises was a commitment to education and research.

Respondent established its research department in the fall of 1979. During their campaign, Meyer and Poli committed themselves to the establishment and support of a research department. Moreover, Respondent had discussed with Lyons expanding the research department. Respondent's increase in legal fees can be at least partially attributed to the increase of unfair labor practice cases, an area in which Lyons performed. It would thus appear to me that Respondent needed Lyons more than ever. Furthermore Respondent's law firm performed some of the duties which had been performed, or would have been performed by Lyons who was an attorney. Counsel for the General Counsel subpoenaed documents from Respondent in an effort to detail Respondent's obligations growing out of having a law firm perform its legal duties. Respondent refused to produce these documents. In *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) [Gyrodyne Co. of America] v. N.L.R.B.*, 459 F.2d 1329 (D.C. Cir. 1971), the court remanded with instructions to the Board that unless within 30 days an employer produces certain records to strike the employer's defense that the terminations were for economic reasons. The basis for this is that the Board had not adequately explained its failure to draw an adverse inference from the employers failure to produce its records. Judge Wright commented in that case:

Indeed, it [the adverse inference rule] is more a product of common sense than of the common law.

Simply stated, the rule provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him. . . .

Accordingly, based on the fact that Respondent did not produce the subpoenaed records, I will infer that they would be unfavorable to its defense.

The record is replete with undisputed evidence which compels me to conclude that Respondent's economic defense is a pretext. Indeed, it serves to convince me more that these individuals were terminated solely for their union and concerted activities. It is a matter of public record that Respondent was having serious problems as a labor organization during this period of time. I am convinced that these four individuals and their Union became a thorn in Respondent's side, which it would no longer tolerate.

In the section of this Decision captioned "Additional Evidence Relating to Respondent's Economic Defense," I have detailed flagrant expenditures of money by Respondent, which fly directly in the face of its economic defense. I will not reiterate that detailed analysis, but will merely hit some of the highlights. For example, within 3 months of the discharges of these individuals, Respondent granted salary increases totaling \$38,500. The very same day that these employees were terminated, employee David Trick commenced to work for Respondent at a salary of \$41,500, per year. The record also reflects that several individuals received raises up to over \$5,000 per year. This evidence falls far short of convincing me that this Respondent was suffering any economic hardship, calling for such drastic measures as terminating these four individuals.

Another area which renders Respondent's defense incredible is the case involving the summer intern Hadley. Respondent had not employed a summer intern since the beginning of 1978. Hadley, a law student, was paid \$250 per week by Respondent. Respondent also paid for Hadley's stay at the Hyatt Regency Hotel at a cost of \$75 per night, and finally it paid for his apartment which cost in excess of \$400 per month. This does not sound like a respondent anxious to save money. In midsummer at the time Respondent had decided to fire the four individuals, Reardon asked Hadley if he would like to work full time for Respondent rather than to return to school. Hadley turned down the job offer.

Respondent hired employees shortly before the terminations. Luff (Reoch) was hired approximately June 16; Wilson was hired approximately June 2.

Respondent spent \$14,736 more in travel, meals, and lodging for the last 6 months of 1980 than it had for the same period in 1979. As set forth earlier in this Decision, Meyers' response to curtailing expenses was to state that housing people at the Hyatt Regency, at \$70 per night, for long periods of time, "has been done in the past as it is currently being done and it will be done in the future."

I note specifically that Respondent's financial statement for the 6-month period ending June 30 was not prepared until September 30, 2 months after the discharges. I agree with counsel for the General Counsel that Respondent presented no evidence as to what financial data is relied on when it decided to terminate the four individuals. What is relevant is Respondent's knowledge of its financial posture as of July 21¹⁰ and on what it

based that knowledge. Respondent did not seek to introduce such evidence or offer any explanation for this omission.

Again, under the section in this Decision relating to Respondent's economic defense, I have pointed out Respondent's generous severance pay policy for the 6-month period ending June 30, 1980. The records reflect therefore that during the last 6 months the salary of the national office increased over the first 6 months by almost \$50,000, specifically \$47,932. during the course of the hearing, counsel for Respondent averred on behalf of its client, "We are not saying we did not have the money. We are saying we had to put the money some place else." There is a dearth of evidence in this record as to where that someplace else was.

At first blush, the lack of union animus in this record might appear to serve as the weak link in this case. To bottom my Decision on that sole element would indeed be a superficial approach. Testimony reflects that when Poli was first presented with the union authorization cards he was, for the record, delighted. He also told Lyons that he thought the Union had made a fine selection of him as president, and that the two of them would work well together. Shortly thereafter Poli did a complete turnaround by refusing to even recognize Lyons as the union president. In my opinion Poli's initial comments about the Union and Lyons were hollow and specious.

The day after the Union held its election of officers, Lyons met with Poli, who immediately wanted to exclude seven of the unit employees from the unit. therefore Poli was attempting to exclude approximately one-third of the unit, including a position which has not even been filed; i.e., Meyer's secretary. After two more meetings between Lyons and Poli, the only issue which has been resolved was that Scott should not be included in the unit. The effort to exclude almost one-third of the employees from the bargaining unit was totally inconsistent with Poli's attitude of acceptance, and belies any contention of good faith. It is noted that there was no evidence presented of why any of these employees with the exception of Scott and Lyons¹¹ should be excluded. I can only conclude that Respondent had no legal basis or good faith in pursuing this, but was simply engaging in an effort to frustrate the Union's efforts.

The alleged discriminatees were most aggressive. Apparently, they exerted pressure to such an extent that the Shapiro study was finally aborted. Despite Respondent's efforts to undermine the Union, it decided to elect new officers, file further charges and engage in informational picketing. Throughout, management was cognizant of the union activities and the fact this union was not going to go away or cease to exist. Immediately prior to the election for new union officers, the foremost active union adherents were summarily discharged.

I resolve any conflicts in credibility and there are a few in favor of Lyons, Hubscher, Miller, and Feldman. They impressed me as reliable witnesses who testified

¹⁰ The date of the terminations.

¹¹ The evidence Respondent produced relating to Lyons' supervisory status was trifling. I consider Resp. Exh. 8, as a self-serving document of absolutely no probative value.

credibly regarding events which they vividly recalled. They did not attempt to embroider or establish facts which were nonexistent. As witnesses, Poli, Reardon, and Meyer were a marked contrast to the union witnesses. They were glib in their efforts to set up a defense. Perusal of Reardon's testimony regarding his expenses and Lyon's supervisory authority is graphically representative of the testimony of Respondent's witnesses. Although Poli sought haven in his lack of union animus, case law imparts that this element is not indispensable.

In *Stockton Kenworth Co.*, 221 NLRB 800 (1975), the question was whether an employee was fired for filing a grievance. There was one incident, which because of its remoteness, was of no value in evaluating Respondent's motivation in discharging the employee. Respondent took the position that, even assuming the reasons for the discharge do not withstand scrutiny, the General Counsel had not proven a violation of the Act because of lack of evidence to show unlawful motivation; i.e., there was no evidence of any other unfair labor practice committed by Respondent or any evidence of union animus.

The Administrative Law Judge, with Board approval, found a violation relying, *inter alia*, on the false reasons given for the discharge and the surrounding facts. He commented in effect that the presence or absence of union animus is an aid in answering the ultimate question, not an answer in itself. He drew his inference under the rationale of *Shattuck Denn Mining Corporation (Iron King Branch) v. N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966). "Nor is the trier of facts . . . required to be any more naïf than is a Judge. If he finds the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where . . . surrounding facts tend to reinforce that inference. . . ."

The statement at footnote 8 in *Westinghouse Electric Corporation*, 235 NLRB 356 (1978), further illuminates the principal, "it is well settled that the element of animus can be established on the basis of circumstantial evidence." The case cites *Ri-Del Tool Mfg. Co., Inc.*, 199 NLRB 969 (1972), where it states "and the timing of the discharge or separation abruptly after employer has learned of an employee's union activities, as here, is one incident of such probative circumstantial evidence." Although the four discriminatees herein were not terminated immediately after Respondent learned of their union activities, these were the four leading union proponents. They continued to exert pressure on Respondent, which finally resulted in picketing during a particularly sensitive time when Respondent was faced with its own labor problems *vis-a-vis* the FAA. They also continued to file unfair labor practices charges. In *Ri-Del Tool* there was not a scintilla of evidence of union animus. In what the dissent characterized as a "fascinating feat of bootstrapping," the Board found that the unlawful discharge in and of itself supplied the animus.

Similarly, in *Auto-Truck Federal Credit Union*, 232 NLRB 1024 (1977), there was no direct evidence that the discharges of two employees was motivated by their union activities, but the Board nevertheless found a violation.

In *Midland Container Corp.*, 190 NLRB 328 (1971), there was no knowledge, yet the Board found a violation concluding, *inter alia*, that the discharges were precipitate not occurring at the end of a pay period, which is the circumstance herein. The courts have stated repeatedly, "direct evidence of a purpose to violate the statute is rarely obtainable." The sole issue in *L. J. Folkins, d/b/a Standard Oil Distributors*, 206 NLRB 468 (1973), was whether Respondent discharged an employee, Smith, because of his union membership or activities, or because he was only hired for a day or two straighten up the warehouse in anticipation of an inventory audit. The only explicit evidence of animus was a reference to the president of the union characterizing him as a "hoodlum." Despite the "meager explicit evidence of Respondent's union animus," The Administrative Law Judge found the discharge of Smith to be in violation of Section 8(a)(1) and (3) of the Act. It is also interesting to note that the Administrative Law Judge also concluded, with Board approval, that the Union having presented Respondent with three cards in a five-person unit, the elimination of one signer effectively destroys the Union's majority, unless the unit is reduced to three majority.

In *Federated Publications Inc. d/b/a the State Journal*, 218 NLRB 151 (1975), the Administrative Law Judge was affirmed by the Board, when he concluded that the lack of union animus is not controlling. That the inference of discriminatory motivation was sustained and buttressed by the fact that the explanation offered by Respondent failed to stand up under scrutiny.

The Board has even considered the skill and sophistication of certain respondents. For example, in *Stoffel Seals Corporation*, 199 NLRB 1084 (1972), the Administrative Law Judge found a violation of Section 8(a)(1) and (3) of the Act with respect to two employees. The Board affirmed the Administrative Law Judge and in addressing the dissent stated:

[I]n our opinion, such timing, which may reflect nothing more than a particular employer's superior sophistication, is not a sufficient basis to disregard otherwise substantial evidence of unlawful motivation . . . from all the proven facts, he [the Administrative Law Judge] inferred that there was no reason, except the Smith's union activities, for their discharges. We believe that his *inference* was factually sound, legally correct, and reasonably made. [Emphasis supplied.]

Counsel for Respondent cite several cases in their brief. *Universal Camera*, the Supreme Court case at 340 U.S. 474 (1951), stands for the proposition that the Board's conclusions must be supported by substantial evidence. *N.L.R.B. v. Great Dane Trailers, Inc.*, which is at 388 U.S. 26 (1967),¹² was a situation where there was an absence of proof of antiunion motivation. In that case respondent refused to pay striking employees vacation benefits, but paid their striker replacements, the returning strikers, and nonstrikers. This was inherently destructive of employees' interests, and the employer did not estab-

¹² It is incorrectly cited as 388 U.S. 26.

lish evidence of legitimate and substantial business justification. This case and *American Shipbuilding Co. v. N.L.R.B.*, 380 U.S. 300 (1965), as well as the case of *N.L.R.B. v. John Brown, et al. d/b/a Brown Food Stores, et al.*, 380 U.S. 278 (1965), which involved a lockout situation, are hardly dispositive of the issues herein.

It is my judgment that the evidence heavily preponderates in favor of finding that Respondent violated Section 8(a)(1) and (3) of the Act when it discharged Lyons, Miller, Feldman, and Hubscher. Therefore, by terminating the four leading union proponents, the Respondent was engaging in conduct so "serious, pervasive, egregious and substantial" that a fair and free election would be impossible. *N.L.R.B. v. Gissel Packing Co., supra*. Accordingly, Respondent, in my view, has violated Section 8(a)(1) and (5) of the Act and the policies and purposes of the Act can best be effectuated by the imposition of a bargaining order. The bargaining obligation began when Respondent commenced its unlawful course of conduct on or about July 18, when it unlawfully promulgated the no-distribution rule.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. A unit comprised of all staff employees, employed by the Employer at its national headquarters in Washington, D.C., but excluding all confidential employees, guards and supervisors, as defined in the Act, is appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. James Lyons is not a supervisor within the meaning of Section 2(11) of the Act.

5. By promulgating and maintaining a no-distribution rule which is overly broad, and which was instituted to frustrate and undermine the Union, Respondent violated Section 8(a)(1) of the Act.

6. Since on or about May 21, the Union has been the only selected representative, for the purposes of collective bargaining of the employees in the unit described above, and, my virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all employees in said unit, for the purposes of collective bargaining with respect to rates of pay, hours of employment, and other terms and conditions of employment.

7. By refusing to bargain with the Union on and after July 18, 1980, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

8. By refusing to bargain collectively with the Union as the exclusive representative of all the employees in the appropriate unit, Respondent has engaged in, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

9. By discharging James Lyons, James Miller, Fran Feldman, and Steven Hubscher, Respondent has engaged in conduct in violation of Section 8(a)(1) and (3) of the Act.

10. Respondent's unfair labor practices are so "serious, pervasive, egregious and substantial" that they preclude the holding of a fair election.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I recommend that Respondent be ordered to bargain with the Union as the exclusive representative of the employees in the appropriate unit with respect to rates of pay, wages, and other terms and conditions of employment, and if an agreement is reached, to embody it in a written signed contract.

I further recommend that Respondent be ordered to rescind its unlawful no-distribution rule.

Having found that Respondent discriminatorily discharged Lyons, Miller, Feldman, and Hubscher, I recommend that Respondent offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges. In addition, I recommend that Respondent make them whole for any losses they may have suffered by reason of the discrimination against them by payment to them of a sum of money equal to that which they would normally have earned from the date of their terminations, less net earnings during said period. Backpay shall be computed according to *F.W. Woolworth Company*, 90 NLRB 889 (1950), and with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). (See, generally *Isis Plumbing & Heating Co.*, 138 NLRB 716, (1962).)

[Recommended Order omitted from publication.]